A

See Hua Realty Bhd (suing on behalf of itself and all other shareholders of the defendant except for the first and second defendant) v KTS News Sdn Bhd & Ors

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–1392–06 OF 2012
ABDUL WAHAB PATAIL, HAMID SULTAN AND VARGHESE GEORGE JJCA
29 MAY 2015

C

Civil Procedure — Appeal — Memorandum of appeal — Stating complaint in memorandum of appeal — Whether memorandum was bad in law for prolixity and irrelevancy — Whether memorandum should be struck out for breach — Facts, finding of — Interference by Court of Appeal — Whether appellate intervention necessary — Whether grounds of trial judge had passed acid test of reasonableness

D

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See Hua Realty Bhd ('the appellant'), suing on behalf of itself and all its shareholders, had initiated a derivative action for the benefit of See Hua News Holding Bhd ('SHNB'). This suit was based largely on the tort of conspiracy that allegedly existed between the first to fifth respondents and the provisional liquidators to commit fraud and injure SHNB by stripping it of its valuable assets. Although the provisional liquidators had been struck out as defendants, the plaintiff had proceeded with the conspiracy against the first to fifth defendants. The trial judge found neither direct nor inferential evidence to support the tort of conspiracy. The trial judge also found that the other claims, which included personal claims, should not have been the subject of a derivative action. In any case, the trial judge was also of the view that these claims were barred by res judicata. Hence the High Court dismissed the derivative action with costs. This was the appellant's appeal against that decision of the High Court.

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Held, dismissing the appeal with costs of RM50,000:

(1) The appellant's approach in stating the complaint in the memorandum of appeal was bad in law for prolixity as well as irrelevancy and ought to have been ordered to be amended and/or struck out for breach of r 18(1) of the Rules of the Court of Appeal 1994 (see para 4).

I

(2) The prayers in the appellant's statement of claim consisted of declaratory relief as well as relief essentially related to finding of facts as well as

discretion of the court and fell within the domain of the trial judge. Though the discretion should not be exercised arbitrarily, the strict rule advocated in *Foss v Harbottle* (1843) 67 ER 189 and the exceptional relief to be pursued by way of derivative action especially on allegations of fraud had to be weighed on a higher scale (see para 12).

(3) It is trite that the appellate court would be slow in disturbing on issues related to findings of facts. In cases relating to company matters where the dominant proposition set out in *Foss v Harbottle* had to be respected and applied for commercial harmony in corporate jurisprudence apex courts had to be extremely careful in intervening on the finding of cases. This was especially so in the instant case where the trial judge had the benefit of the demeanour of the appellant's six witnesses and was satisfied that the appellant had not made out a case within the strict parameters of derivative action. The grounds of the trial judge had passed the acid test of reasonableness and there was no merit in the appellant's complaint (see paras 13–14).

[Bahasa Malaysia summary

See Hua Realty Bhd ('perayu'), menyaman bagi pihaknya dan kesemua pemegang-pemegang sahamnya, telah memulakan tindakan derivatif bagi kepentingan See Hua News Holding Bhd ('SHNB'). Tindakan ini adalah berdasarkan sebahagian besarnya atas tort pengkomplotan yang didakwa wujud di antara responden pertama hingga kelima dan penyelesai sementara melakukan fraud dan mencederakan SHNB dengan melucutkannya daripada aset berharganya. Walaupun penyelesai sementara telah dibatalkan sebagai defendan-defendan, plaintif telah meneruskan dengan pengkomplotan terhadap defendan pertama hingga kelima. Hakim bicara mendapati tiada keterangan terus atau berdasarkan inferens menyokong tort pengkomplotan. Hakim bicara juga mendapati bahawa tuntutan-tuntutan lain, yang termasuk tuntutan-tuntutan peribadi, yang tidak patut menjadi subjek tindakan derivatif. Walau bagaimanapun, hakim bicara juga berpandangan bahawa tuntutan-tuntutan ini dihalang oleh res judicata. Maka, Mahkamah Tinggi menolak tindakan derivatif dengan kos. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, menolak rayuan dengan kos sebanyak RM50,000:

(1) Pendekatan perayu dalam menyatakan aduan dalam memorandum rayuan adalah tidak betul dari segi undang-undang kerana bahasa berjela dan tidak berkaitan patut diarahkan dipinda dan/atau dibatalkan kerana kemungkiran k 18(1) Kaedah-Kaedah Mahkamah Rayuan 1994 (lihat perenggan 4).

(2) Permohonan-permohonan dalam pernyataan tuntutan mengandungi relief perisytiharan dan juga relief yang secara dasarnya berkaitan dapatan

fakta dan juga budi bicara mahkamah dan terangkum dalam kekuasaan hakim bicara. Walaupun budi bicara tidak patut dilaksanakan secara sewenang-wenangnya, peraturan ketat yang disokong dalam kes *Foss v Harbottle* (1843) 67 ER 189 dan relief luar biasa diburu melalui tindakan derivatif terutamanya atas dakwaan fraud mesti diimbang atas skala yang lebih tinggi (lihat perenggan 12).

(3) Adalah nyata bahawa mahkamah rayuan akan perlahan dalam campur tangan atas isu berkaitan dapatan fakta. Dalam kes-kes berkaitan perkara syarikat di mana cadangan dominan yang ditetapkan dalam kes *Foss v Harbottle* perlu dihormati dan diguna pakai bagi keharmonian perdagangan dalam perundangan korporat, mahkamah tertinggi perlu amat berhati-hati dalam campur tangan atas dapatan kes-kes. Terutamanya dalam kes ini di mana hakim bicara mendapat manfaat daripada tingkah laku enam saksi perayu dan berpuas hati bahawa perayu tidak membuktikan kes dalam parameter ketat tindakan derivatif. Alasan-alasan hakim bicara telah lulus ujian asid kemunasabahan dan tidak terdapat merit dalam aduan perayu (lihat perenggan 13–14).]

Notes

For cases on memorandum of appeal, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1526–1560.

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 3 MLJ 417; [1995] 4 CLJ 551, CA (refd)

Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd J-02(NCVC)(W)-963–05 of 2012 (Unreported), CA (refd)

Foss v Harbottle (1843) 67 ER 189 (refd)

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2013] 2 MLJ 650, CA (refd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)

Legislation referred to

Companies Act 1965 s 181A

Rules of Court of Appeal 1994 r 18(1)

Appeal from: Suit No 22–218 of 2007-II (High Court, Kuching)

Andy Tan (Suhaili & Bong) for the appellant.

M George Lo (Wong Li Chin with him) (George Lo & Partners) for the first to fifth respondents.

Hamid Sultan JCA:

[1] The appellant/plaintiff appeals against the decision of the learned High Court judge who dismissed the derivative action initiated by the appellant against the respondents. The matter came up for hearing on 11 November 2013 and we found no merits and dismissed the action. My learned brothers Abdul Wahab bin Patail JCA and Varghese a/l George Varughese JCA have read the judgment and approved the same.

BRIEF FACTS

[2] The facts of the instant case have a history of multiple action and decision of courts concerning the parties to this action as well as others. The learned trial judge has documented it in his 30 page judgment in an articulate manner. We do not propose to set it out here save to say that this action is anchored on the jurisprudence relating to derivative action. Derivative action and the methodology employed to come to conclusion is primarily one relating to finding of facts and it is well settled that the appellate court must restrain itself in intervening in matters relating to finding of facts. The decision of the learned trial judge relating to that finding can be summarised as follows:

1. The burden of proof in a case of civil fraud is on the Plaintiff to the standard of beyond reasonable doubt evidence;
2. The Plaintiff has not discharged the said burden of proof even on the balance of probabilities;
3. There is no evidence of an agreement or improper communication between the alleged conspirators and the damage done or suffered. None of the Plaintiff's witnesses managed to produce any evidence indicative of collusion and conspiracy between the 1st Defendant and the provisional liquidators. The nomination of the provisional liquidators by the 1st Defendant to be appointed by the winding up court cannot suggest collusion as it is a standard practice for applicants in a winding up process;
4. There is no evidence of the accounts being falsified and manipulated and money actually removed from the 8th Defendant or any of its subsidiaries. The differences between the two sets of financial statements are not sufficient to prove that the Defendants had manipulated the accounts to support the winding up petition;
5. The 3rd Defendant did not breach his fiduciary duties by affirming the affidavit to support the winding up of the 8th Defendant;
6. There is no evidence to support the tort of conspiracy. Other claims, such as personal claims, are not subject of a derivative action and in any case are barred by res judicata.

[3] The action is initiated by the plaintiff for the benefit of the eighth defendant. The learned trial judge has summarised the grounds for his decision. It will save much judicial time if the conclusion is repeated. It reads as follows:

> The bedrock of this suit is the tort of conspiracy between the 1st to 5th defendants and the provisional liquidators to commit fraud and injure the 8th defendant by stripping it of its valuable assets. Although the provisional liquidators had been struck out as defendants by the Court of Appeal, the plaintiff proceeded with the conspiracy against the 1st to 5th defendants. For reasons given earlier, I found neither direct nor inferential evidence to support the tort of conspiracy. The other claims include personal claims which should not be the subject of a derivative action and claims that are barred by the doctrine of res judicata. The reason is that the issues raised in those claims were ventilated in previous proceedings and had been adjudicated up to the level of the Federal Court or the Court of Appeal. Counsel for plaintiff argued that res judicata was not pleaded specifically. However, at the time of the pleadings in this case were filed, some of the earlier proceedings had not concluded and for that reason it would not be possible to include such a plea. The failure to plead the doctrine of res judicata is not fatal as the court possesses inherent jurisdiction to bar a claim on this ground. In the well known case of *Badiadin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, Peh Swee Chin FCJ opined that the court can rely on this doctrine even if it is not argued or pleaded:
>
> > Before dealing with the point on which the Court of Appeal relied, let me deal briefly first with the other point of view referred to by me earlier, that of res judicata. The doctrine of res judicata would apply and bar the making of the order directly concerned, because the said previous order had become the truth between the landowners and the charge, and the order directly concerned would constitute a challenge to the truth or accuracy of the said previous order. It is true that the doctrine was not expressly argued or expressly relied on by the courts below.
> >
> > However, the High Court ought to have also dismissed the fresh subsequent proceeding in which the order directly concerned was made by still exercising its inherent jurisdiction by relying on *the said doctrine even though it was not pleaded by any of the parties* (see Superintendent of *Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 at p 498 (SC); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1955] 3 MLJ 189 at p 202 (FC) and *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1977] 2 MLJ 105 (FC). (Emphasis added.)
>
> The inclusion of myriad issues and claims that were ventilated in the earlier pleadings, whether in a full trial or affidavit based proceedings, has the effect of turning a large part of the instant suit into a consolidation of proceedings that had already been concluded. Counsel for 1st to 5th defendant is therefore correct to argue that the court should dismiss those claims and prevent the plaintiff from having a second bite at the cherry.
>
> In conclusion, I shall wholly dismiss the claim of the plaintiff with costs of RM200,000.

[4] The appellant had filed a lengthy memorandum of appeal consisting of 20 pages which has no jurisprudential value in relation to a complaint related to derivative action which is a specific cause of action related to a pre determined relief. The appellant's approach in stating the complaint in the memorandum of appeal is bad in law for prolixity as well as irrelevancy and ought to have been ordered to be amended and/or struck out for breach of r 18(1) of the Rules of Court of Appeal 1994.

JURISPRUDENCE RELATING TO DERIVATIVE ACTION

[5] Derivative action at common law and now the new insertion under s 181A of the Companies Act 1965 is seen as an exception to the dominant rule that majority decision of a company is binding on the minority as advocated in *Foss v Harbottle* (1843) 67 ER 189.

[6] The well established principle in the case of *Foss v Harbottle*, advocates the proposition that: (i) courts will not interfere in matters of internal administration; (ii) it is for the majority members to decide the manner in which the affairs of the company are to be conducted.

[7] The plaintiff's action is based on the jurisprudence relating to derivative action. And derivative action is generally commenced by a minority shareholder who is a member to seek relief on behalf of the company against the majority or those who are in control of the company, who have done wrong to the company. Derivative action is an exception to the rule in *Foss v Harbottle* (often referred to as proper plaintiff rule) where it was held that prima facie, every action must be brought in the name of the company to remedy a wrong done to it. Subsequent cases have made much inroads to this strict rule and now there is even a statutory provision by way of *s 181A of the Companies Act 1965* which was inserted by an amending Act in 2007, which enables action to be brought in the name of the company itself for wrong done to the company. (Emphasis added.)

[8] The rule in *Foss v Harbottle* and the exception leading to derivative action has been explained in a number of cases. Gopal Sri Ram JCA (as he then was) in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417; [1995] 4 CLJ 551 had this to say:

> We begin with the rule in *Foss v Harbottle* [1843] 67 ER 189. The rule has two limbs. The first limb of the rule – and the present appeal has nothing to do with its application – is that a Court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* [1847] 41 ER 833. The modern

restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212. A

The second limb of the rule is of much wider purport and is universal in its application. It is based upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. B C

Perhaps the clearest statement of the rule is to be found in the judgment of Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064 at p 1066:

The rule in *Foss v Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. D

Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio. E

There are several exceptions to the rule in *Foss v Harbottle* , both as a result of case law and through the intervention of Parliament. For present purposes, there are two exceptions that call for detailed discussion. We will refer to these later in this judgment. F

The several exceptions to the rule in *Foss v Harbottle* that are the product of case law appear in the illuminating judgment of Edgar Joseph Jr J (now FCJ) in *Tan Guan Eng & Anor v Ng Kweng Hee & Ors* [1991] 4 CLJ 74 (Rep); [1991] 3 CLJ 1881. It is an important decision in the field of company law and in it there are set out several propositions that clarify the position in an area of the law that is not altogether free from difficulty. The exceptions referred to by His Lordship in that case are as follows: G

(1) Ultra vires acts: 'in cases where the acts complained of are wholly ultra vires the company or association the rule has no application because there is no question of the transaction being confirmed by any majority'. H

(2) Fraud on the minority: 'where what has been done amounts to what is generally called in these cases as a fraud on the minority and the wrongdoers are themselves in control of the company, the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as 'a minority shareholders' action on behalf of themselves and all others'. I

(3) Special majorities: 'an individual member (is not) prevented from suing if the matter ... (is) one which could validly be done or sanctioned, not by a simple majority of the members ... but only by some special majority'.

(4) Personal rights: Where 'the personal and individual rights of members of (the plaintiffs) have been invaded', the rule 'has no application at all'.

(5) When the justice of the case requires it, though this has been doubted by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries (No 2).*

For completeness, we refer to the statutory exception. This is to be found in the far reaching and extremely beneficial remedy housed in s 181 of the Companies Act 1965. It may, on reflection, be inaccurate to refer to it as an exception of the rule now under consideration. In truth it is an abrogation of the rule itself in those circumstances to which the section applies.

We now turn to consider the one exception with which this case is concerned. It is the derivative action; an ingenious procedural device created by Court of equity by which the rule of judicial non-interference is overcome. It is based upon the premise that the company which has been wronged is unable to sue because the wrongdoers are themselves in control of its decision making organs and will not, for that reason, permit an action to be brought in its name. In these circumstances, a minority shareholder may bring an action on behalf of himself and all the other shareholders of the company, other than the defendants. The wrongdoers must be cited as defendants. So too must the company. The title to the action must reflect that the suit is being brought in a representative capacity. The statement of claim or other pleading filed in support of the originating process must disclose that it is a derivative action and recite the facts that make it so. Further, there must be an express statement in the pleading that the action is being brought for the benefit of the company named as a defendant. An action that does not meet these requirements is liable to be struck out as being frivolous and vexatious.

[9] It must not be forgotten that the exception to *Foss v Harbottle* by way of derivative action was developed in the form of procedural device by the fiat of court to remedy a wrong that would otherwise escape redress. The learned authors of *Guide to the Companies Act*, A Ramaiya at p 112 had this to say:

The question whether this list of exceptions is exhaustive or whether the courts can go on expanding it whenever justice of the situation has been considered in a number of cases and has been thus answered by K NOX J in *Smith v Croft (No 2),* [1998] Ch 114 at pp 139 and 170 : [1987] 3 All ER 909: 'The fact that such a yardstick (ie justice of the case) would or might be unsatisfactory because it does not give a practical guide to the limits of the rule and its exceptions does not detract from the fact that the 'whole doctrine whereby a minority shareholder is permitted to assert claims on behalf of the company is rooted in procedural expedients and adopted to prevent a wrongdoing without a redress'. The other cases in which this point has been considered are: *Estamanco (Kilner House) Ltd v Greater London Council,* [1982] 1 WLR 2 at 11: [1982] 1 All ER 437; *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* [1969] 92 WN (NSW) at pp 199 and 208; *Biala Pty Ltd v Mallina Holdings Ltd* [1988] 14 ACLR 350, Western Australia.

[10] Exceptions to the proper plaintiff rule and its true exception is well articulated by the learned authors, Aiman Nariman, Aishah Bidin, Pamela

Hanrahan, Ian Ramsay and Geof Stapledon, in their book titled *Commercial Applications of Company Law in Malaysia*, (3rd Ed) by CCH Publications at pp 360–361 as follows:

> Exceptions to the proper plaintiff rule
>
> Realising that breaches of duty may not be enforced where the alleged wrongdoers are directors who are a majority of the board, the courts subsequently developed several exceptions to the proper plaintiff rule in *Foss v Harbottle*. These are the exceptions to the proper plaintiff rule:
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> [95] An infringement to a member's personal right;
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> [95] Ultra vires act: a conduct of the company which is against its objects clause – sec 20;
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> [95] A decision/ resolution requiring special majorities but passed by simple majorities;
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> [95] Fraud on the minority;
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> [95] Where justice of the case so requires.
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> (See *Tan Guan Eng v Ng Kweng Hee* [1991] 4 CLJ 74 (Rep); [1991] 3 CLJ 1881; [1992] 1 MLJ 487; *Abdul Rahim b Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 4 CLJ 551; [1995] 3 MLJ 417).
>
> Nonetheless, the only true exception is fraud on the minority because this is a situation where the wrong is done against the company and the shareholder is allowed to enforce the company's rights on behalf of the company.

[11] There is much merit in the observation of the learned authors that 'the true exception is fraud on the minority' as in our view other infringements can be adequately dealt with, other than by way of derivative action.

FINDING OF FACTS

[12] The prayers in the statement of claim from pp 94–97 consisting of declaratory relief as well as relief essentially relates to finding of facts as well as discretion of the court and falls within the domain of the trial judge. Though the discretion cannot be exercised arbitrarily the court is duty bound to weigh the strict rule advocated in *Foss v Harbottle* and the exceptional relief which can be pursued by way of derivative action in matters relating to managerial decision. The courts are slow to infer impropriety or fraudulent conduct. And the burden of proof on allegation of fraud or even impropriety has to be weighed on a higher scale as advocated in the case of *Miller v Minister of Pensions* [1947] 2 All ER 372.

[13] It is trite the appellate court will be slow in disturbing on issues related to finding of facts (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650). In cases relating to company matters where

A the dominant proposition set out in *Foss v Harbottle* had to be respected and applied for commercial harmony in corporate jurisprudence apex courts have to be extremely careful in intervening on the finding of facts; more so in the instant case as the trial court had heard six witnesses of the plaintiffs and have the benefit of the demeanour and was satisfied the appellants have not made
B out a case within the strict parameters of derivative action.

[14] We are satisfied that the grounds of the learned trial judge, passes the acid test of reasonableness and there is no merit in the appellant's complaint. See *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* J-02(NCVC)(W)-963-05 of
C 2012 (23 January 2013).

[15] For reasons stated above, the appeal is dismissed with costs of RM50,000 to the first to fifth respondents. Deposit to the respondent to account of costs.
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Appeal dismissed with costs of RM50,000.

Reported by Kohila Nesan

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